No. 464

FILED
SEP 26 1940
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1940

TSUNE-CHI YU, *Petitioner,*

vs.

CARL BYOIR AND ASSOCIATES, INC.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

HAROLD RIEGELMAN,
H. H. NORDLINGER,
420 Lexington Avenue,
New York City,
Counsel for Petitioner.

INDEX

PAGE

Petition for Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit 1

Summary Statement of the Matter Involved and Question Presented 2

Jurisdiction 2

Reasons Relied on for the Allowance of a Writ . 2

Brief in Support of Petition for Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit . 5

Opinions of the Courts Below 5

Jurisdiction of the Court 5

A. Statutory Provision Relied On 5

B. Petition Timely Filed 5

Nature of the Case and Rulings Below 6

Statement of the Case 6

Specification of Error Intended to Be Relied Upon 7

Argument 7

Conclusion 11

AUTHORITIES CITED:

DECISIONS:

Boeing Air Transport Inc. v. Farley (75 F. [2d] 765, 768) 10

Carolina Glass Co. v. South Carolina (240 U. S. 305).. 9

Compania Espanola v. Navemar, 303 U. S. 68 7

Cunningham v. Macon & Brunswick R. R. Co. (109 U. S. 446) 9

Ex parte State of New York #1 (256 U. S. 490, 500) .. 10

Ezra v. Lamont, 265 N. Y. 635 7-8

PAGE

Gallopin v. Winsor, 234 N. Y. App. Div. 601 8

Haskins Bros. v. Morgenthau (85 F. [2d] 677; certiorari denied 299 U. S. 588) 10

Hewitt v. Speyer, 250 Fed. 367 7

Highway Commissioners v. Utah Co. (278 U. S. 194) .. 10

In re Ayers (123 U. S. 443, 487 *et seq.*) 9

Lankford v. Platte Iron Works (235 U. S. 461) 9

Minnesota v. Hitchcock (185 U. S. 373, 387) 9, 10

Murray v. Wilson Distilling Co. (213 U. S. 151) 9

Osborn v. United States Bank, 9 Wheat. 738 9

Transcontinental & Western Air, Inc. v. Farley (71 F. [2d] 288, 290 *et seq.*) 10

Smith v. Weguelin, 15 Weekly Reporter 558, L. R. 8 Eq. 198 8

Wells v. Roper (246 U. S. 335) 10

Worcester County Trust Co. v. Riley (302 U. S. 292, 296) 10

STATUTES AND RULES CITED.

Judicial Code, section 347-a 2, 5

Rules of the Supreme Court of the United States, XXVIII (5)b 3

Rules of Civil Procedure for the District Courts of the United States, 12(b)(1) and 12(b)(6) 1

OTHER AUTHORITIES CITED.

Deak "The Plea of Sovereign Immunity and the New York Court of Appeals", Columbia Law Review, March, 1940 .....2n

Wheaton's International Law, Vol. I, p. 237 8

Supreme Court of the United States

OCTOBER TERM, 1940

TSUNE-CHI YU, *Petitioner,*

vs.

CARL BYOIR AND ASSOCIATES, INC.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Justices of the Supreme Court of the United States:

Your petitioner (defendant below) asks a writ of certiorari to review a judgment of the Circuit Court of Appeals for the Second Circuit, reversing with costs a judgment of the District Court for the Southern District of New York. The judgment of the District Court dismissed the complaint, on petitioner's motion made under Rules 12(b)(1) and 12(b)(6) of the Rules of Civil Procedure for the District Courts of the United States for lack of jurisdiction over the subject matter of the action and for failure to state a claim upon which relief can be granted. The Circuit Court of Appeals reversed the judgment of the District Court with costs and held that the motion to dismiss should have been denied.

A brief memorandum was handed down by COXE, D. J., when he granted the motion (R. 13). The decision of the Circuit Court of Appeals, which was unanimous, is embodied in an opinion by Circuit Judge PATTERSON (R. 17 *et seq.*).

Summary Statement of the Matter Involved and Question Presented

Briefly, the question involved is whether the complaint, which is in form against the Consul General of the Chinese Government at New York, is in fact against the Chinese Government itself, and hence violates the rule granting immunity from suit to a friendly sovereign government.

Jurisdiction

The jurisdiction of this Court is invoked under Section 347-a of the Judicial Code.

Reasons Relied on for the Allowance of a Writ

The case, in our view, is within the reason and philosophy of the rule of sovereign immunity. It goes without saying that this rule is of great public and, indeed, international importance.*

---

*The importance of giving this rule its full scope is emphasized in a recent article entitled "The Plea of Sovereign Immunity and the New York Court of Appeals," by Professor Deak, in the Columbia Law Review of March, 1940.

There is, so far as we are aware, no decision of this Court ruling on the precise question presented in the instant case. None is cited either in the opinions or in the briefs below.

It is, therefore, submitted that the case comes squarely within subdivision (5)b of Rule XXXVIII of the rules of this Court which, among others, specifies cases "where a circuit court of appeals * * * has decided an important question of federal law which has not been, but should be, settled by this Court" as one of the class of cases in which a review by certiorari may be appropriate.

WHEREFORE it is respectfully prayed that a writ of certiorari be granted to the end that the judgment of the Circuit Court of Appeals for the Second Circuit be reversed and that the case be remanded to the District Court for the Southern District of New York with directions to reinstate the judgment of that court, dismissing the complaint with costs.

Dated, September 25, 1940.

TSUNE-CHI YU,
Petitioner,

By HAROLD RIEGELMAN,
H. H. NORDLINGER,
Of Counsel for Petitioner,
420 Lexington Avenue, New York City.